



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 2 OF 2013

IN THE MATTER OF ARTICLES 20, 22, 23, 24, 38 and 159 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF ALLEGED AND VIOLATION AND CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE CONSTITUTION UNDER ARTICLES 20, 22, 23, 24, AND 38 OF THE CONSTITUTION OF KENYA 2010

WACHIRA MARTIN NGIRI 1ST PETITIONER
AGNES WANJIRU GAKUNGURU 2ND PETITIONER
CATHERINE WAWIRA JOHN 3RD PETITIONER
ESTHER NJERI NYAGA 4TH PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION 1ST RESPONDENT
JOHNSON SAKAJA 2ND RESPONDENT
GEORGE ONYANGO OLOO 3RD RESPONDENT
AGATHA MUTHONI MBOGO 4TH RESPONDENT
JAMES KATHENDU TAMUGWIKA 5TH RESPONDENT
WINROSE NGITHI IRERI 6TH RESPONDENT

RULING

The four Petitioners herein filed this petition against the Respondents pursuant to Provisions of the Constitution, Election (General) Regulations 2012 and the Political Parties Act. The National Party of Kenya (TNA) to which they belong was sued as the 2nd Respondent but it has not filed any papers in response to the Petition. Their prayer is that the list of TNA nominees to the Embu County Assembly be rectified by removing the names of the 3rd, 5th and 6th Respondents and replacing them with those of the

1st, 2nd and 4th Petitioners.

The petition is supported by the affidavits of the Petitioners and various annexures. The Respondents save for the 2nd Respondent have filed replying affidavits opposing the Petition. The 1st, 3rd and 5th Respondents have filed Notices of Preliminary Objections. In summary the issues raised by the three (3) Respondents are as follows;

- i. This Court lacks jurisdiction to determine the matter.
- ii. The Petitioners rushed to this Court before exhausting all avenues for dispute resolution.
- iii. The petition is bad in law, form and substance.

Counsels for the 1st, 3rd and 5th Respondents made oral submissions. The 4th Respondent also submitted. They submitted that the relevant Acts have set down procedures for dispute resolution which have to be exhausted before a party came to this Court. They further stated that such procedures had not been exhausted. The 4th Respondent submitted that the Petitioners matter had been heard twice by two Tribunals in April and May 2013 and in each case the matter had been dismissed.

Mr. Momanyi argued that no provision of the law had been cited to show that this Court had no jurisdiction to hear the matter. And for him small errors could be amended. He did not however state what these errors were. Paragraph 8 of the Petition states as follows;

“The Petition is brought pursuant to the Nomination dispute arising out of filling up of special seats to Embu County Assembly on The National Alliance Party (TNA)”.

It is clear that the dispute is on **NOMINATIONS**. The nominations were pursuant to the Provisions of Article 177(1) (b) (c) of the Constitution. It is agreed that this is not an Election Petition. The issue then is whether there is provision for dealing with Nomination disputes.

The Law

Article 88 of the 2010 Constitution of Kenya establishes The Independent Electoral and Boundaries Commission and sets out the functions of the said body. Article 88 (4) provides as follows;

- a. ***The continuous registration of citizens as voters***
- b. ***The regular revision of the voters’ roll***
- c. ***The delamination of constituencies and wards***
- d. ***The regulation of the process by which parties nominate candidates for election***
- e. ***The settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.***

Article 88 (4) of the Constitution is repeated word by word in section 4 of The Independent Electoral and Boundaries Commission Act 2011. This Act does not elaborate anywhere how one goes about the dispute resolution as its main features are on the composition and management of the Commission. The Political Parties Act is the Act that provides for the registration, regulation, funding and related purposes of the Political Parties. **Section 39** of the said Act establishes the Political Parties Disputes Tribunal. **Section 40 (1)** of the same Act sets out the scope of the disputes that the tribunal may determine. These are;

- a. ***Disputes between the members of a political party and a political party***
- b. ***Disputes between a member of a political party and political party***
- c. ***Disputes between political parties***
- d. ***Disputes between an independent candidate and a political party***
- e. ***Disputes between coalition parties and***
- f. ***Appeals from decisions of the Registrar under this Act.***

Further section 40(2) states

“Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolutions mechanisms”.

Section 41 (2) of the said Act provides for an avenue for appeal. It states;

“An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court”.

The Political Parties Act sets out the procedure to be followed in a case where dispute arises from nominations and it should be followed to the letter. It does not anywhere provide for Judicial Review which at times is the only alternative where the Act is silent or does not provide for how to appeal from a decision of any given body.

Section 74 of the Elections Act provides as follows;

- 1. Pursuant to Article 88 (4) (e) of the Constitution, the Commission shall be responsible for settlement of electoral disputes, including disputes relating or arising from nominations but excluding election petition and disputes subsequent to the declaration of election results.***
- 2. An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.***
- 3. Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.***

The material on record confirms that the Petitioners were not happy with the Nominations. These Nominations involved the 1st and 2nd Respondents. It also clearly came out that (WMN -6) a complaint over this nomination had been raised before The Independent Electoral and Boundaries Commission Tribunal. The Tribunal heard the complaint and dismissed it. In the case of ***SPEAKER OF THE NATIONAL ASSEMBLY –V- KARUME [2008] 1 KLR EP 425*** it was held by Kwach, Cockar and Muli JJA;

“There was considerable merit in the submission that where there was a clear procedure of the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should have been strictly followed”.

The Political Parties Act and the Elections Act provide for an elaborate procedure of dealing with disputes arising from the Nomination Process. That procedure ought to have been followed and exhausted especially where the Petitioners had already presented their grievance to The Independent Electoral and Boundaries Commission Tribunal. Of relevance here is section 41(2) of the Political Parties Act. What is before this Court is the Petition filed herein in this Court’s original jurisdiction. The decision of the Tribunal still stands as it has not been challenged or set aside. It would be an unpleasant scenario to have the decision of the Tribunal and another one by this Court in its original jurisdiction over the same matter. My finding therefore is that this Court lacks jurisdiction to deal with this matter before it. I uphold the preliminary Objections raised and strike out the Petition. Each party to bear his/her own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 18TH DAY OF SEPTEMBER 2013

H.I. ONG'UDI

J U D G E

In the presence of:-

M/s Muthoni for Momanyi for Petitioner

M/s Ndorongo for 3rd Respondent

M/s Wairimu for 5th Respondent

M/s Ndorongo for parties

Kathungu for 1st Respondent

Njue – C/c